

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA BOARD OF TEACHING

In the Matter of the Proposed
Revocation or Suspension of
the Teaching Licenses of
David A. Shaw

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on May 16, 2000, in the courtrooms of the Office of Administrative Hearings in Minneapolis, Minnesota. The record closed on August 7, 2000, upon receipt of the parties' post-hearing reply briefs.

Bernard E. Johnson, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota, 55103-2106, appeared on behalf of the Disciplinary Committee of the Board of Teaching. William F. Garber, Attorney at Law, Education Minnesota, 41 Sherburne Avenue, St. Paul, Minnesota 55103, appeared on behalf of the Licensee, David Shaw.

This Report is a recommendation, not a final decision. The Board of Teaching will make the final decision after a review of the record. The Board may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and to present argument to the Board. Parties should contact Michael L. Tillmann, Executive Director, Minnesota Board of Teaching, 1500 West Highway 36, Roseville, Minnesota 55113 (telephone: 651-582-8866) to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The following issues are presented in this case:

1. Did the Licensee violate Minn. Stat. § 122A.20, subd. 1(a)(1), by engaging in conduct exhibiting immoral character or conduct?
2. If the Licensee did, in fact, violate the above statute by engaging in conduct exhibiting immoral character or conduct, should disciplinary action be taken against his teaching licenses?

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. David A. Shaw, the Licensee, holds two teaching licenses that are under the jurisdiction of the Minnesota Board of Teaching. These licenses are in classroom music and vocal music. Both of his licenses expire on June 30, 2001.^[1]

2. The Licensee has been employed by Independent School District No. 271 (Bloomington) as a music teacher at Olson Junior High (now known as Olson Middle School), Olson Elementary School, and Indian Mounds Elementary School since approximately 1988.^[2] Prior to being employed in Bloomington, the Licensee taught vocal music in Iowa over a four-year span in two different school districts.^[3]

3. On November 24, 1998, while employed as a teacher by the Bloomington School District, the Licensee attended an educational technology conference at the Hyatt Hotel in downtown Minneapolis.^[4] The conference occurred on a school day and the Licensee received permission from the School District to attend the conference. He was on professional leave of absence. A substitute teacher was in charge of the Licensee's classes that day.^[5]

4. Officer Martin Werner and Officer King, police officers with the Minneapolis Police Department, were working off-duty as security officers at the Hyatt Hotel on November 24, 1998, to investigate complaints of inappropriate sexual activity in the men's restrooms at the hotel.^[6] This job was not in any way related to their regular police duties.^[7] Officers Werner and King had worked for the Hyatt since approximately November 1997.^[8] During that time, Officer Werner has made 30 to 100 arrests of individuals in the restrooms.^[9] A nationwide web site advertised the Hyatt's men's restrooms as a place where individuals "cruised for sex."^[10] On November 24, 1998, Officers Werner and King were stationed in the second floor men's restroom.^[11]

5. The Licensee arrived at the November 24 conference at approximately 7:00 a.m. He attended three presentations before lunch and one after lunch.^[12] At approximately 2:00 p.m., he needed to use the restroom, so he went to the second floor hotel restroom.^[13] He had never been in that second floor restroom and was not aware that the restroom had a reputation for being an area where gay sexual activity took place.^[14] The Licensee entered the restroom and went into the center, unoccupied stall.^[15] Officer Werner was in the handicapped stall, which is the stall located on the Licensee's left. Officer King was in the stall on the Licensee's right.^[16] The partition between the stalls extended to approximately 1 or 1-1/2 feet from the floor.^[17]

6. After the Licensee finished going to the bathroom, he noticed that the person to his right was tapping his foot. He then turned to his left and saw that that person was also tapping his foot.^[18] The Licensee recognized this as a signal that gay men use to meet each other.^[19] After the feet on the right and left tapped again, the Licensee decided to tap back, first on the right and then on the left, because he thought "there might be somebody who might be interested in meeting me."^[20] The Licensee noticed shadows on the floor that appeared to him to indicate that both men were masturbating and later that they were bending over.^[21] The Licensee leaned over and made eye contact with both men.^[22] The person on the Licensee's left (Officer Werner) wiggled his finger at the Licensee underneath the stall and whispered, "Show it, show it, show it."^[23] The Licensee knelt on the floor and showed his erect penis to Officer

Werner because he thought that that “was probably going to be the basis as to whether or not he’d want to meet me.”^[24] The Licensee did not intend to have any sexual interaction in the restroom but simply wished to meet someone.^[25] The Licensee got back up off the floor, there was a silence for a few seconds, and then he asked, “Well, what did you think?” He heard Officer Werner say, “It’s nice.” Both officers then left their stalls. The Licensee got dressed and exited his stall shortly thereafter. He was given a citation for a misdemeanor count of indecent exposure as they stood near the sinks.^[26] The Licensee was taken to the hotel security office, photographed, and told to leave the Hyatt and not return for 90 days or longer, or he would be arrested immediately for trespassing.^[27] He then went home.^[28]

7. The Licensee could not sleep for several days after the incident and became very depressed and upset. He was embarrassed and ashamed and began to plan to commit suicide. He put his house on the market the day after Thanksgiving and contacted an estate sale agency about selling many of his possessions because he wanted to get rid of his belongings to make it easier on his relatives after he died. He traveled to Chicago before New Year’s to say goodbye to his sister and her family. On New Year’s Day, the Licensee called the employee assistance health line and spoke to a counselor who referred him to a psychologist. That psychologist, in turn, referred him to his present psychologist, Dr. Peter Olson, whom the Licensee has been seeing on a weekly basis since January, 1999.^[29]

8. On February 3, 1999, the Licensee entered into an Agreement to Suspend Prosecution pursuant to Minnesota Rule of Criminal Procedure 27.05. Under the agreement, the State agreed to suspend prosecution of the case under until February 3, 2000, on the condition that the Licensee pay \$200.00 in court costs, stay out of the Hyatt Hotel for one year, and commit no same or similar offenses for a year. The Licensee met all of these requirements, and the criminal charge was eventually dismissed on February 3, 2000.^[30] The Licensee thus has no criminal record. The prosecutor did not ask that the Licensee stipulate to the facts as stated in the police report and he did not have to enter a plea.^[31]

9. The men’s restroom involved in this incident is a public restroom that is located on the Hyatt Hotel skyway near escalators and elevators.^[32] It is located on the same floor as hotel ballrooms used for meetings and conferences, two small restaurants, a souvenir shop, and a store that sells candy and magazines.^[33] However, the bathroom was tucked away around a corner and down a hallway and could be difficult to find.^[34] A sign posted inside the restroom between the urinals and the stalls stated that any type of criminal conduct taking place in the restroom would be turned over to the proper authorities for prosecution.^[35] Students frequent the hotel for conferences, special events, and state tournaments in hockey, wrestling, basketball, and cheerleading.^[36] Children sometimes use the restroom.^[37] There is, however, no evidence that anyone other than the two security officers and the Licensee was present in the restroom at the time the November 24, 1998, incident occurred.^[38]

10. The Disciplinary Committee of the Board of Teaching reviewed the allegations against the Licensee and recommended that the Board proceed to disciplinary action with a suspension or revocation. The action proposed was a suspension for two years with a demonstration of fitness to teach.^[39] The Disciplinary

Committee determined that the Licensee's actions did rise to the statutory level of immoral character or conduct and demonstrated questionable judgment.^[40]

11. On April 14, 2000, the Disciplinary Committee of the Board of Teaching served counsel for the Licensee with a Notice of and Order for Hearing. The Committee alleged that the Licensee's conduct on November 24, 1998, constitutes immoral character or conduct and justifies the revocation or suspension of his teaching licenses under Minn. Stat. § 122.20, subd. 1(a)(1).

12. The Licensee's performance evaluations have rated him far above average or exceptional.^[41] His judgment or performance in the classroom has never been questioned. The Licensee has never before been involved in a proceeding challenging his teaching licenses and he has never been the subject of complaints by student, parents, or other school staff during his years of teaching.^[42] He is involved in union, professional, community, school and church activities.^[43] Although the School District's Director of Human Resources and Superintendent are aware of the November 24, 1998, incident, the School District has not given the Licensee any oral or written reprimand or other discipline.^[44]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Board of Teaching have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 122A.20, subd. 1 (1998).

2. The Board has complied with all relevant substantive and procedural requirements of law and rule.

3. The Licensee received proper and timely notice of the hearing in this matter.

4. Pursuant to Minn. Stat. § 122A.20, subd. 1(a)(1), the Board of Teaching may revoke or suspend a teacher's licenses for "[i]mmoral character or conduct."

5. Minn. R. 8710.0800, subp. 3, specifies in part that:

The length of each suspension and any terms and conditions attached thereto shall be determined by the Board of Teaching upon the consideration of the following factors:

A. the activity of the individual which led to the licenses suspension; and

B. any relevant mitigating factors which the individual may interpose on the individual's behalf; and

C. the prior teaching record of the individual; and

D. other similar factors.

6. Under Minn. R. 1400.7300, subp. 5, the burden of proof in this proceeding is upon the Disciplinary Committee of the Board of Teaching, who must establish the facts at issue by a preponderance of the evidence.

7. The Disciplinary Committee has not proven by a preponderance of the evidence that the Licensee's conduct on November 24, 1998, constitutes immoral character or conduct within the meaning of Minn. Stat. § 122A.20, subd. 1(a)(1).

8. These Conclusions are reached for the reasons discussed in the Memorandum below, which is incorporated in these Conclusions by reference.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED THAT the Board of Teaching take no disciplinary action against David A. Shaw's teaching licenses.

Dated: September 8, 2000.

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape-recording transcribed by Jean A. Brennan, Court Reporter, Brennan & Associates, 3052 Woodlark Lane, Eagan, Minnesota 55121-1915.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Minn. Stat. § 122A.20, subd. 1(a)(1), authorizes the Board of Teaching to revoke or suspend a teacher's license if the Board finds that the teacher's behavior constitutes "immoral character or conduct." Although both parties agree that the Licensee exposed his penis to an off-duty Minneapolis police officer who was working undercover security at a downtown hotel, the parties disagree concerning whether the officer initiated and encouraged the contact by being the first to tap his feet and by asking the Licensee to "show it." The parties also dispute whether the Licensee's behavior constitutes "immoral character or conduct" so as to authorize the imposition of discipline by the Board.

As noted in the Findings above, the Administrative Law Judge has generally credited the Licensee's testimony concerning the November 24, 1998, incident. The Licensee appeared to be honest and straightforward in his testimony. He provided a detailed description of the November 24, 1998, incident and admitted that he exposed his penis to Officer Werner, even though such an admission is contrary to his interests

in this case. This was a very significant event in the Licensee's life and one that he remembers well despite its traumatic nature. The Licensee testified in a credible fashion about his mental state around the time of the incident and his intentions on November 24, 1998. He was estranged from most of his family members and was facing the holiday season alone after a recent separation from a partner. Although he entered the restroom solely with the intention of using the facilities, when others in the restroom signaled that they were gay and were possibly interested in meeting him or having sex with him,^[45] he responded and even exposed his penis when requested to do so, in the hope of meeting someone. He did not initiate the behavior and he did not engage in any sexual contact in the restroom.

In contrast, although Officer Werner claimed that he remembered most of the incident specifically and that he recognized the Licensee specifically,^[46] it became evident as the hearing proceeded that he did not have a clear memory of the precise details of the incident. He was unable to identify the Licensee and his testimony concerning the incident was inconsistent with his written police report. Officer Werner acknowledged that it was possible that either his testimony or his written report was incorrect.^[47] Officer Werner's lack of precise recall is understandable given the fact that he has issued a number of citations for similar offenses during the past several years. Moreover, the Licensee's allegations that Officer Werner played an active role in the incident are consistent with allegations made by other individuals he has cited for indecent exposure. Officer Werner's statements in a report he dictated relating to a separate incident in the Hyatt Hotel as well as his acknowledgement in the present case that he responded to the Licensee's foot-tapping also suggest that he was, on occasion, willing to play the part of a consenting partner in order to obtain the necessary grounds for a citation.^[48] For these reasons, the Licensee's testimony concerning the incident was found to be more credible than that of Officer Werner.

The further issue is whether the Licensee's behavior constituted "immoral character or conduct" under Minn. Stat. § 122A.20, subd. 1(a)(1). The Disciplinary Committee argues that the Licensee engaged in a public display of sexual activity and that this behavior constitutes immoral character or conduct. The Disciplinary Committee emphasizes that the Licensee was attending an educational conference at the Hyatt in his capacity as a teacher and had been given permission to attend the conference on a school day. The Committee contends that the Licensee's attempt to initiate sexual contact in a public place where the conduct can be observed by others, including children, clearly constitutes immoral character or conduct. The Committee emphasizes that "[t]his is not a case of sexual acts between consenting adults in the privacy of their own home, but a case of a licensed teacher in a public place exposing his genitals to a complete stranger in an attempt to initiate sexual contact."^[49] The Committee emphasizes that it has taken disciplinary action against a teacher involved in a similar situation in the past, citing the *Ebnet* case, and also relies upon a Missouri case, *C.F.S. v. Mahan*, in which the Missouri Court of Appeals held that a local school board "could conclude that a teacher who behaved as the appellant did, within a recent time frame, was unsuitable to serve as a teacher and coach in the school system." The teacher in that case was arrested on charges of indecent exposure after he was first seen massaging his penis in the men's restroom of a public facility and later, while in his car,

exposed his genitals to another man (who turned out to be an undercover officer) and made a remark suggesting anal intercourse.^[50]

The Committee points out that the Legislature considers exhibition of a person's genitals to be serious behavior that in some instances can lead to a permanent automatic revocation of a teacher's license, citing Minn. Stat. § 609.3451, subd. 3 (criminal sexual conduct in the fifth degree includes lewd exhibition of the genitals in the presence of a minor under the age of 16) and Minn. Stat. § 122A.20, subd. 1(b) (a felony level fifth degree criminal sexual conduct conviction is subject to the provisions of an automatic permanent revocation of a teacher's license). The Committee acknowledges that the Licensee was not charged with or convicted of fifth degree criminal sexual conduct, nor was he convicted of any criminal offense. The Committee also contends that the Licensee's conduct at the hotel calls into question his judgment as a teacher, since teaching is a decision-making profession. The Committee notes that the Licensee's psychologist testified that the behavior at issue was psychologically unhealthy.

In response, the Licensee, while admitting that he exposed his penis to an off-duty police officer in the Hyatt Hotel, argues that his behavior was provoked by the officers, that his intent and mental state preclude his act from being a violation of the law, and that he must be judged using the standards for gay men. Under those standards, he contends that his actions were neither unusual nor immoral. Although the Licensee admits that he made a mistake, he argues that such a mistake does not mean he has an immoral character. He contends that his behavior in the incident also does not constitute immoral conduct and argues that it is not immoral to seek a partner or to be gay or lesbian. The Licensee asserts that he has accepted responsibility for the mistake and has paid for it by virtue of the suicidal depression that he experienced after the incident, and points out that he has been in therapy since January, 1989. The Licensee asserts that the evidence demonstrated that he is a highly moral, truthful, and caring person who is a wonderful teacher, friend, and role model. He contends that his conduct on November 24, 1998, harmed no one but himself and is not known in the school community.

The Licensee asserts that his conduct was not immoral. He points out that he never pled guilty to any crime, nor was he convicted of any crime. The Licensee also contends that the incident on November 24, 1998, did not constitute indecent exposure since the Licensee did not willfully nor lewdly expose his private parts. Even if his conduct constituted indecent exposure, the Licensee contends that he was entrapped by the actions of the officers, and argues that the Disciplinary Committee has not taken disciplinary action against individuals who have engaged in premarital sex, extramarital sex, or sodomy and have thereby violated other Minnesota sex-related laws. The Licensee also argued that both officers had a financial interest in making arrests since, if the activity at the Hyatt ceased, they could lose their off-duty security jobs.

Minn. Stat. § 122A.20 does not define the phrase "immoral character or conduct," and no Minnesota decisions have attempted to define this standard. The term "immoral" is defined in Webster's New World Dictionary of the American Language^[51] to mean "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; sometimes, specif., not in conformity with

the accepted standards of proper sexual behavior; unchaste; lewd.” The term is defined in Black’s Law Dictionary to mean “[c]ontrary to good morals; inconsistent with the rules and principles of morality; inimical to public welfare according to the standards of a given community, as expressed in law or otherwise. Morally evil; impure, obscene; unprincipled; vicious; or dissolute.”^[52]

In a 1996 decision,^[53] the Minnesota Supreme Court affirmed the revocation of a teacher’s license for engaging in immoral conduct after the teacher was terminated for improper sexual contact with a student. The Court did, however, note that conduct that one community might find immoral may not be so labeled in another location in the state. The Court also stated that the Board was not required to revoke a license upon a finding of immoral conduct and stated that the Administrative Law Judge must consider any additional evidence that the licensee wishes to present concerning the alleged immorality of his or her conduct. Thus, under *Falgren*, it appears that it is necessary to consider on a case-by-case basis whether particular conduct constitutes “immoral character or conduct” within the meaning of the statute and that the surrounding circumstances must be considered both with respect to whether immoral conduct occurred and also with respect to the appropriate discipline to be imposed.

Courts in other jurisdictions have attempted to define “immoral” conduct. For example, in *Clarke v. Board of Education*,^[54] the Nebraska Supreme Court found that a teacher’s use of racial slurs constituted “immorality” using the following definition:

The term “immoral” has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.^[55]

The Court thus upheld the teacher’s termination. In *Horosko v. Mt. Pleasant Township School District*,^[56] the Pennsylvania Supreme Court used the following definition of immorality:

We hold it to be self-evident that, under the intent and meaning of that act, immorality is not essentially confined to a deviation from sex morality; it may be such a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to elevate.^[57]

Administrative Law Judges in other cases involving the Board of Teaching have found that a teaching applicant’s conviction of third degree criminal sexual conduct, combined with evidence that he had coerced and threatened a female former student into repeated sexual intercourse, constituted immoral conduct;^[58] a teacher’s conviction of second degree criminal sexual conduct involving a non-student adolescent female constituted immoral conduct;^[59] and an applicant’s conviction of assault in the fourth degree involving non-students constituted immoral conduct.^[60] However, a teacher’s conviction of three counts of misdemeanor telephone harassment and surrounding

conduct involving the father of a former student, while reprehensible, was found not to demonstrate immoral character or constitute immoral conduct:

In light of the circumstances, it is difficult to classify [the teacher's] conduct as corrupt, indecent, depraved or dissolute, or as conduct which offends the morals of the community in which it occurred. The conduct was, of course, not a good example and did violate the law. But it was not behavior committed in front of students as in Clarke and Horosko. It is not behavior which will be known to students where the Licensee is teaching. It has not been shown that the conduct offended the morals of the community. It has not been demonstrated that the Licensee's conduct was "immoral" within the ordinary meaning of the term.^[61]

As noted above, the Disciplinary Committee relies in part upon another Board of Teaching contested case proceeding, *In the Matter of the Suspension of the Teaching Licenses of Ronald L. Ebnet*.^[62] In that case, a teacher exposed his semi-erect penis under a bathroom stall partition to a Minneapolis police officer who was working security at a downtown department store. The teacher failed to appear for the hearing, and the Board presented evidence in support of its action. A default report was issued by an Administrative Law Judge who found, in accordance with the allegations contained in the Notice of and Order for Hearing, that the conduct constituted immoral character or conduct and recommended that the license be suspended or revoked. The Administrative Law Judge emphasized that the teacher's conduct "occurred on a weekday when public school was not in session, and at a time when children could be expected to use the public restroom" and found that the "conduct described in Findings of Fact No. 6, at the time and place where it occurred, constitutes immoral character and conduct."^[63] By order dated September 17, 1999, the Board ultimately suspended Mr. Ebnet's licenses for a period of not less than three years and until such time as he could demonstrate by independent evidence to the satisfaction of the Board that he was fit to teach. In an accompanying Memorandum, the Board stated that Mr. Ebnet "used poor judgment by engaging in indecent conduct in a public place which is easily accessible to children and where they might likely be present" and "also did not appear at the hearing before the Administrative Law Judge in this case, which resulted in all the allegations in the Notice and Order for Hearing being taken as true and incorporated into findings of fact by the Administrative Law Judge."^[64] Because the *Ebnet* case was a default decision, the Administrative Law Judge concludes that it has no real precedential value in this case.

The Administrative Law Judge finds that the contested case of *In the Matter of the Denial of the Application for Teaching Licensure of C.M.*,^[65] involved underlying facts that are more analogous to the case at bar. In that case, the Board considered whether C.M.'s vacated and expunged conviction for disorderly conduct and/or the facts giving rise to that conviction could be used as a basis for the denial of a teaching license. C.M. appeared and vigorously contested the proposal to deny his license application. The evidence showed that, in January, 1992, two and one-half years prior to his application for a teaching license, a shopping mall security guard found C.M. engaging in a sexual act with another adult male in the men's restroom. C.M. pled guilty to disorderly conduct. The court ordered that the guilty plea would be withdrawn,

the matter would be stricken from the calendar, and the conviction would not appear on C.M.'s record if he paid court costs of \$100, remained law-abiding in all respects, did not have any same or similar incidents within a year, and complied with limited probation counseling requirements during the following year. C.M. complied with these requirements and the conviction was removed from his record. He applied for a teaching license in August, 1994, and disclosed the conviction on his license application. The Board initially denied the application based in part on its view that his conviction and conduct constituted "immoral character or conduct."^[66] C.M. appealed the denial, and a contested case hearing was held. The Administrative Law Judge recommended that the Board not deny the license application of C.M. based upon the expunged, vacated conviction for disorderly conduct or the facts and circumstances giving rise to the conviction. The Board ruled in its final Order that the court's expungement power in removing a criminal conviction did not bar the Board from denying a license application based on conduct rather than the conviction. The Board concluded, however, that "C.M. has not engaged in conduct in violation of Minn. Stat. § 125.09, subd. 1(1) [the statute that was then in effect that permitted the Board to revoke or suspend a license for "immoral character or conduct"] that justifies the denial of his license application." C.M.'s teaching license application was therefore granted. The Board did not further explain its decision in a Memorandum.

The Board of Teaching is not required to show that a teacher is unfit to teach in order to discipline him for immoral conduct.^[67] However, based upon the relevant case law, the Board must consider the surrounding circumstances in determining whether a licensee's behavior does, in fact, constitute "immoral character or conduct" subject to discipline under the governing statute.

Based upon the particular circumstances presented in this case, it is difficult to classify the Licensee's conduct as corrupt, indecent, depraved, or dissolute, or as conduct that offends the morals of the community in which it occurred. The Licensee's conduct of exposing his penis under a stall partition in a public restroom was, of course, objectionable and certainly would not be a good example to his students if his conduct were to become known. However, no one other than off-duty police officers were present, and they encouraged and appeared to consent to this behavior. In addition, because the exposure took place under a partition between two restroom stalls and not in a more generally accessible area in the restroom, it is questionable how "public" the exposure was and how easily it would have been viewed by others, had they been present. Because C.M. was discovered when he was engaging in a sexual act with another man, his situation should be viewed as more serious than that of the Licensee in the present case, who merely exposed his penis at the request of another and did not engage in sexual contact in the restroom. If the Board determined that the Licensee's conduct was immoral in this case, that decision would be difficult to reconcile with the Board's decision in the *C.M.* case.^[68]

The incident did not occur in a school building, and there is no evidence that anyone other than a few school staff know about the incident. As in the *Altonn* case cited above, the Licensee did not commit this behavior in front of students, his behavior is not known to students where he is teaching, and it has not been shown that the conduct offended the morals of the community or that his conduct was "immoral" within

the ordinary meaning of the term. Moreover, the undisputed evidence at the hearing demonstrated that the Licensee has a superior record of performance during his sixteen-year employment as a teacher. There is no evidence of any prior complaints or licensing concerns involving the Licensee. Despite the arguments of the Committee, there was no demonstrated basis to assume that the Licensee's exercise of poor judgment in his private life on November 24, 1998, was anything but a one-time mistake, and no evidence that he has ever exercised poor judgment in his teaching job.

Most importantly, Dr. Olson, the Licensee's treating psychologist, testified that the Licensee does not pose a threat to adults or students, has very good boundaries around children, and does not display or experience any sexual desire for children. Dr. Olson also testified that there is no scientific connection or clinical correlation between consensual adult acts and pedophilia.^[69] He also emphasized that the Licensee has changed his sexual behavior and his attitude towards himself and other gay people and has become more willing to start initiating relationships that could become long-term relationships, and that the Licensee understands why he did what he did and feels no further compulsion to do it again. These opinions were echoed by the Licensee, who has continued in counseling since January, 1999.^[70]

For all of these reasons, the Administrative Law Judge is not persuaded that the Licensee's behavior constitutes "immoral character or conduct" under Minn. Stat. § 122A.20, subd. 1(1), and therefore recommends that no disciplinary action be taken against the Licensee's teaching licenses.

B.L.N.

^[1] T. 63-64, 154.

^[2] T. 159

^[3] T. 154-59.

^[4] T. 23, 175, 220.

^[5] T. 174, 220-22.

^[6] T. 10-12, 29, 30.

^[7] T. 53-54.

^[8] T. 12, 25, 29.

^[9] T. 32.

^[10] T. 13-14.

^[11] T. 14, 35.

^[12] T. 176-77.

^[13] T. 22-23.

^[14] T. 178.

^[15] T. 180.

^[16] T. 14-15, 35; Ex. 1.

^[17] T. 17, 43.

^[18] T. 181-82, 223.

^[19] T. 224.

^[20] T. 182-83.

^[21] T. 185-86, 225.

^[22] T. 186-87, 225-26.

^[23] T. 187-88.

^[24] T. 16-18, 43, 188, 226.

[25] T. 188-89.
[26] T. 189-91.
[27] T. 18-22, 192-93, 195-96; Exs. 2, 3.
[28] T. 196.
[29] T. 112, 129. 196-98, 202 -05, 228.
[30] T. 59-60, 94-96; Exs. 3, 4.
[31] T. 96-97, 194.
[32] T. 14, 23, 26-27.
[33] T. 25.
[34] T. 55, 179.
[35] T. 24.
[36] T. 26.
[37] T. 25.
[38] T. 50.
[39] T. 65.
[40] T. 66.
[41] T. 169-70.
[42] T. 156-57, 159, 161-62, 168.
[43] T. 164-67, 209-10, 214-15.
[44] T. 168-69, 217-18.
[45] Officer Werner acknowledged that the fact that he tapped his foot in response to the Licensee could have meant to the Licensee that he wanted to meet the Licensee or, in the alternative, could have meant that he might be interested in having sex with the Licensee. T. 38-40, 51.
[46] T. 34-35.
[47] T. 47.
[48] See Testimony of Burg and Ex. 6.
[49] Disciplinary Committee's Post-Hearing Brief at 4.
[50] 934 S.W.2d 615, 619 (Mo. App. 1996).
[51] (2d ed. 1970).
[52] (5th ed. 1979).
[53] *In re Falgren v. Board of Teaching*, 545 N.W.2d 901 (Minn. 1996).
[54] 338 N.W.2d 272 (Neb. 1983).
[55] *Id.* at 276.
[56] 6 A.2d 866 (Pa. 1939).
[57] *Id.* at 868.
[58] *In the Matter of the Appeal of the Denial of the Licensure Application of Louis E. Sabin*, OAH Docket No. 69-1302-8623-2 (1994).
[59] *In the Matter of the Proposed Revocation of the Teaching License of Ronald L. Studt*, OAH Docket No. 4-1302-1696-2 (1988).
[60] *In the Matter of the Denial of the Licensure Application of Joel W. Andersen*, OAH Docket No. 1-1302-12511-2 (1999).
[61] *In the Matter of the Proposed Revocation/Suspension of the Teaching Licenses of Kirsten L. Altonn*, OAH Docket No. 1-1302-11829-2 (1998).
[62] OAH Docket No. 15-2301-12384-2 (Aug. 25, 1999); Order of the Board issued Sept. 17, 1999 (Ex. 5).
[63] Ex. 5, Finding No. 11 and Conclusion No. 5.
[64] Ex. 5.
[65] OAH Docket No. 11-1302-9178-2 (ALJ Report issued Feb. 22, 1995; Order of the Board issued March 17, 1995).
[66] The Board also contended that C.M. was teaching without proper licensure because he began teaching in the St. Paul School District while his license application was still pending, pursuant to the policy of the St. Paul School District.
[67] *Accord Nicholson v. ISD No. 363*, CO-91-1404, 1992 WL 48113 (Minn. App. 1992). In addition, it is clear that there is no requirement that criminal charges be filed or that a teacher be convicted of criminal charges for his or her conduct to demonstrate "immoral character or conduct" under the statute. Thus, the fact that the charges against the Licensee were continued for dismissal and eventually were

dismissed has no bearing on Board's ability to take disciplinary action. The primary issue is whether or not the Licensee's behavior on November 24, 1998, constitutes immoral character or conduct.

^[68] The Missouri case upon which the Board relies (*C.F.S. v. Mahan*) is also distinguishable because the conduct of which the teacher was accused was of a much more "public" and less consensual nature than that of the Licensee in the present case; the school board regulations involved in that case expressly provided for disciplinary action based on a teacher's guilty plea to a misdemeanor charge and the teacher had entered such a plea; and the court of appeals was applying a broader and different standard than the "immoral character or conduct" standard involved in the present case because the school board regulations involved prohibited "conduct of such a nature as to bring discredit upon the school system."

^[69] T. 123-25, 133, 139.

^[70] T. 212-13